(3)

Supreme Court, U.S.
FILED
AUG 11 1995
CLERK

No. 94-2116

IN THE

# Supreme Court of the United States

## October Term, 1994

---

Landscape Properties, Inc.
Debtor In Possession, *Petitioners*

v.

Robert A. Vogel and Joe D. Whisenhunt, *Respondents*

---

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

---

## REPLY

---

C. Richard Crockett*
R.J. Brown
Crockett & Brown PLLC
10809 Executive Center Drive
Little Rock, Arkansas 72211
(501) 221-2939
Attorneys for Petitioner
Landscape Properties, Inc.
*Counsel of Record

PARAGON PRINTING & STA., 311 East Capitol Avenue, Little Rock, AR 72202 (501) 375-1281

BEST AVAILABLE COPY

5 pp

# TABLE OF CONTENTS

Page

TABLE OF CONTENTS ..... i

ARGUMENT ..... 1

CONCLUSION ..... 3

No. 94-2116

IN THE

# Supreme Court of the United States

## October Term, 1994

Landscape Properties, Inc.
Debtor In Possession, *Petitioners*

v.

Robert A. Vogel and Joe D. Whisenhunt, *Respondents*

Petition for Writ of Certiorari
To the United States Court of Appeals
For the Eighth Circuit

## REPLY

## ARGUMENT

Pursuant to Supreme Court rule 15.6, this Reply is limited to arguments perceived to be first raised in the brief in opposition.

Respondents argue that the Trustee and Petitioner's shareholders "only wanted Vogel and Whisenhunt to resolve their dispute so that they could conclude this sale at the price agreed upon", and that the motivation for such wish was to prevent a lengthy process of higher offers and hearings. (Res. Brf. 3-4).

Actually, it was Respondents who were "frustrated" by the bankruptcy sales process. The Trustee wanted the bidding war which was terminated by Respondent's Agreement.

Respondents argue impossibility as a defense to avoidance because the Trustee distributed proceeds of the sale to creditors. Respondents quote part of the Trustee's February 6, 1990, response to Vogel's objection to the distribution. (Res. Brf. 10-11).

In context, the Trustee alleged:

"7. Vogel further states that if his Motion to Dimiss is denied, he will seek recission of the real estate sale requiring the Trustee to pay separate Defendant Whisenhunt $1,200,000 in return for the subject real estate. Trustee admits that if he makes distributions contemplated by the subject Motion, he will be unable to effectuate such recission, however, states that recission is not a possibility under the circumstances of this case.

8. Pursuant to §363(n) of Code invoked by Trustee as the basis of the adversary proceeding filed herein, *only the Trustee may avoid a sale,* therefore, recission is not available to Defendant Vogel". *[sic]* (Emp. sup.)

Congress used the word "avoid" in 11 U.S. Code § 363(n), not the word "rescind". Avoiding the sale is not the same as rescission. Congress knows how to enact a rescissory remedy. *Randall v. Loftsgaarden,* 478 U.S. 647 (1986) (rev'g. 768 F.2d 949). After avoiding the sale, a trustee can sell the property at its higher true value.

Consequently, after avoiding the sale, a trustee will be able to refund the controlled price for the property, even if tender of the consideration at time of suit is not possible. The nature of the remedy of avoiding the sale provided by 11 U.S.C. § 363(n) should be first decided by this Court.

## CONCLUSION

The court should issue a writ of Certiorari to the United States Court of Appeals for the Eight Circuit.

RESPECTFULLY SUBMITTED,

C. Richard Crockett*
R. J. Brown
Crockett & Brown PLLC
P.O. Box 24003
Little Rock, Arkansas 72221
(501) 221-2939
*Attorney for Petitioner,*
*Landscape Properties, Inc.,*
*Debtor in Possession*
*Counsel of Record